IN THE

Supreme Court Of The United States

JERALD V. NIETERT AND DORIS A. NIETERT, HUSBAND AND WIFE; C. L. GOODWIN AND ALICE GOODWIN, HUSBAND AND WIFE ..... *Petitioners*

VS. NO. 78-457

CITIZENS BANK & TRUST COMPANY OF VAN BUREN, ARKANSAS ..... *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT

So far as the Petition for Writ of Certiorari filed herein complies with the United States Supreme Court Rule 23, 28 U.S.C.A., in presenting a concise statement of the grounds upon which the jurisdiction of this Court is invoked and showing the pertinent judgments, dates, statutory provisions, etc., the respondent does not materially disagree. It is not a concise statement of the case containing the facts material to the consideration of the questions presented and in many instances the same contains conclusions of counsel for petitioners, it is argumentative and statements of purported facts are not supported by the preponderance of the evidence or no evidence whatever. Therefore the following brief statement of the facts as we understand them is submitted.

There has never been any record title or evidence of title whatever in the petitioners, Nieterts, and their interest in the mortgaged property was unknown by respondent until their contract was introduced at the time of the hearing in the trial court. That contract which is not of record discloses an agreement to purchase this property from the petitioners, Goodwin, on the 19th day of April, 1974.

Prior to June 5, 1974, the petitioners made application to S. D. White who was an official of Citizens Bank & Trust Company of Van Buren, Arkansas, the respondent, and also of the Farmers Coop of Arkansas and Oklahoma, to refinance a then existing indebtedness of petitioners, Goodwin, to Farmers Coop of Arkansas and Oklahoma in the sum of $77,729.87 which was then secured by mortgage upon the lands here involved and also by security agreement and financing statement covering chickens and laying house equipment, and which note, mortgage, and security interest had been assigned to the respondent bank, and for the advancement of an additional $30,000.00 with which to purchase chickens. On June 5, 1974, all of the petitioners executed note for $107,729.89 to the respondent bank which covered the then existing principal indebtedness of $77,729.87 plus an additional advancement of $30,000.00 for the purchase of chickens to be housed and grown on the farm land, together with real estate mortgage covering the land, and security agreement and financing statement covering the chickens and equipment then on the farm plus the additional 30,000 chickens then being acquired. On June 5th, Mr. White, the loan officer, gave notice of the right of rescission to Mr. C. L. Goodwin and Mr. Gerald Nietert and they signed therefor. He clearly failed to give any such notice to Mrs. Goodwin or Mrs. Nietert or he failed to obtain

their signatures thereto. The note evidencing the indebtedness was due on demand.

In the spring of 1976 the lending bank requested or demanded payment and on May 3, 1976 the borrowers, petitioners, through the letter of their attorneys at that time, Mr. C. Richard Lippard of Booneville, Arkansas and Honorable J. H. Evans of Fort Smith, Arkansas, formerly Chancellor of the Tenth Chancery District of Arkansas, delivered to the bank, the respondent, notice that they elected to rescind and cancel the transaction entered into with the bank on June 5, 1974, such notice being in the form of a letter addressed to Mr. Dane Riggs, president of the bank, and which letter is copied in full in the opinion of the Supreme Court of Arkansas, Appendix "A" of petitioners' printed Petition and Argument in Support Thereof. This letter advised the bank that the borrowers had elected to rescind the entire transaction, that they were not liable for any financing charges which had accrued from and after June 5, 1974, but that their clients were obligated to return the original principal amount of the loan after having received full credit for all payments made from the time of the inception of the loan. This letter concluded with the request that the bank advise the total payments received from and after June 5, 1974 on said indebtedness in order that they may calculate the amount of refund owed by the borrowers to the lending institution.

Thereafter the respondent received an additional letter from counsel for the petitioners which was dated May 13, 1976, which referred to and confirmed the previous letter and discussions with Mr. Riggs, president of the bank and the bank's attorney, and reaffirming that the obligors were obligated to pay the original amount of the loan less

previous payments thereon. There was no request, demand, or suggestion in either letter that the bank, the respondent, should satisfy and release its security instruments until the original amount of the indebtedness, less payments theretofore made thereon, had been refunded.

The respondent bank agreed to accept the principal exactly as outlined in the two letters and continued to be willing to accept the same to the date of the trial of the action in the trial court. After a delay from May 13, 1976 to November 22, 1976, a period of approximately six months with no apparent progress by borrowers in obtaining funds or paying the principal, the lending bank filed suit for foreclosure of the mortgage and other security instruments. Answer containing a general denial of the allegations of the complaint was filed on February 9, 1977. Various other pleadings were filed by the defendants, petitioners, including a cross-complaint against Farmers Coop of Arkansas and Oklahoma and S. D. White. This cross-complaint was stricken and dismissed, the trial proceeded only against the respondent here, and there is no appeal from the order dismissing the cause of action against Farmers Coop of Arkansas and Oklahoma and S. D. White.

On August 11, 1977 the petitioners, defendants in the trial court, filed a counterclaim against the respondent here in which they reaffirmed matters set up in the answer and amendment to answer and in which they first prayed that they recover a reasonable attorney's fee as determined by the court. This counterclaim was filed long after time, it was filed without permission of the court and after the suit had been pending for approximately eleven months. It is only in the amended answer and in the counterclaim that

the defendants, petitioners, first indicate that there was a refusal to satisfy and release the mortgage and other security instruments; prior to that time there had been no such demand, it being the previous position that the bank had forfeited all financing charges and that it was the duty of the appellants to refund the principal amount less all sums previously paid. The judgment of the trial court was that the petitioners should pay the principal after allowing credit for all payments made thereon, this judgment was affirmed by the Supreme Court of the State of Arkansas, and it is this judgment which petitioners would review.

BRIEF AND ARGUMENT

Counsel for petitioners have devoted a major portion of their petition and argument to the proposition that the court erred in finding that two of the petitioners, defendants in the trial court, Jerald V. Nietert and C. L. Goodwin, received notice of the right of rescission. From the very time of the receipt of the notice of rescission by the respondent lending institution on May 3, 1976, it has admitted that two of the petitioners were not properly served with notice of the right of rescission and therefore that all of the borrowers had that right. The trial court found that the real issue in the trial and the only issue to be decided by the court was whether or not the failure of appellee to give the proper notice of the right of rescission to Mrs. Nietert and Mrs. Goodwin relieved all of the defendants, petitioners, of their obligation of paying the principal and interest due under the note, mortgage and security agreement; that if any of the defendants failed to receive the notice of the right of rescission then all had the right to rescind. The court further found that all of the defendants had the right to and did rescind and thereupon the lender was obligated to return any advancement, down payment or whatever it may have received from the obligors and to release the security instruments. Likewise, the court found that the obligors were obligated to return any funds they received under the agreement as indeed they themselves proposed and the bank or creditor was obligated to accept the same. It was not a question then and it is not a question now whether proper notice was given — it is admitted that the proper notice was not given and the court has so held. It is not a question of whether there was the right of rescission — the court has held there was such right.

It is apparent throughout the petition and brief that the real complaint is the court's interpretation of the statute and regulation and the duties and responsibilities of the parties when notice was not given and the right of rescission existed.

The interpretation of the statute and the regulation and the duties and responsibilities of the parties arising thereunder was first outlined and stated by counsel for these petitioners in a letter dated May 3, 1976, notifying the bank that they had elected to rescind the entire transaction, which letter is copied in full in the opinion of the Supreme Court of Arkansas, Petitioners' Appendix "A", pages 24 and 25, and which states in part:

> "The exercise of this Right of Rescission renders the entire transaction void and voids any security interest which the Citizens Bank and Trust Company might have had by virtue of this transaction. Furthermore, our clients are not liable for any finance charges which have accrued since June 5, 1974. Our clients are obligated, however, to return the original principal amount of the loan advanced after having received full credit for all payments made since June 5, 1974.
>
> "Please advise as to the total payments that Citizens Bank and Trust Company have received since June 5, 1974, on said indebtedness, so that we may calculate the amount of refund owed by our clients to the Citizens Bank and Trust Company."

The interpretation placed upon the statute and regulation by the court was the exact same interpretation placed thereon by petitioners in the above letter of May 3, 1976, that is, that the lender had forfeited all financing charges but it was the duty of the obligors to tender and pay the

original amount of the loan advanced after having received full credit for all payments theretofore made. The court further held that the penalty for failure to comply with the Truth In Lending Statute and Regulation Z was that the lender had forfeited all financing charges in connection with the loan and that the borrower was only obligated for the principal amount of the loan exclusive of any financing charges, including interest.

To fully confirm its position as to the duties of the parties under the law, regulation and existing facts on May 13, 1976, counsel for the petitioners delivered an additional letter to the president of the lending bank which letter is shown in full in the opinion of the Supreme Court of Arkansas, Appendix "A", pages 26 and 27, parts of which are as follows:

> "I am writing this letter to confirm my previous discussions with you and Mr. Batchelor. On May 3, 1976, I advised you that Jerald V. Nietert and C. L. Goodwin were electing to rescind that certain transaction with the Citizens Bank and Trust Company on June 5, 1974.
>
> "By this letter, I hope to clarify our position. As noted in my previous letter, my clients are obligated to pay the original principal amount of the loan advanced after having received full credit for all payments made since June 5, 1974. However, since this will necessitate my clients obtaining a loan elsewhere, they are willing to pay interest at the rate reflected in the original note from May 3, 1976, until the aforesaid principal amount of the note is paid. Furthermore, I will assure you that if we can reach an agreed settlement, my clients will immediately make application to the Farmers Home

> Administration for the necessary funds to repay this principal amount due."

Throughout the trial it was readily admitted by the borrowers that immediately upon receipt of the above letters, the lender readily agreed to accept the principal after allowing credit for all payments previously made with no interest and no financing charges whatever and that it would allow the borrower such a time as was necessary to obtain a loan elsewhere and, as shown by the findings of the trial court and the opinion of the Supreme Court of Arkansas, the borrowers sought funds from at least five financial institutions, with which to repay the principal sum due the lender. All such applications were denied.

It is clear that petitioners have changed their posture with reference to the settlement offer which they made and which was accepted by the lender and are now insisting that they should not repay any principal due because the bank did not release the security interest within ten days after notice of rescission in accordance with the statute and regulation. It is also readily obvious that the borrowers did not request satisfaction or release of the security instruments for the reason that they had interpreted the statute and regulation to require them to repay to the lender the principal sum less payments previously made and they did not have the funds with which to do so. They were unable to obtain these funds from other lending institutions and upon this development, they seek to free the property from the lien of the bank leaving it without any protection whatsoever. A court of equity, be it state or federal, cannot close its eyes to such an invidious scheme disguised in the name of consumer protection which has its main objective to defeat the security interest of the creditor who has

cooperated with the debtor fully and even during the trial offered to withhold action in order to give the obligors additional time to secure funds to pay their debt.

Approximately six months after the above mentioned letters disclosing the election to rescind and offering to repay the principal were received by the lending institution and after it was disclosed that the obligors had failed in their attempts to obtain financing, suit was commenced in the lower court for foreclosure of the security instrument. The judgment was for the principal of the loan, less all payments previously made and exclusive of interest, closing cost or attorney's fee. Regardless of how the argument may be put by petitioners, the appeal is from this finding and judgment and this finding and judgment alone.

Our research has failed to disclose any litigation in the courts of the State of Arkansas with reference to this federal statute and regulation promulgated thereunder. All the litigation has arisen in the United States District Courts and in many of the early cases the District Courts apparently were unaware of the equitable power to condition rescission on tender of repayment by the debtor, but as early as August, 1974, in the case of *Palmer v. Wilson, et al*, 502 F.2d 860, (Ninth Circuit), the court recognized the equitable power and duty of courts to condition their decrees granting rescission upon tender of repayment. The following is a quotation from that case:

> "Although some district courts have conditioned rescission on tender of repayment by the debtor when both rescission and damages were sought (e.g., Ljepya v. M. L. S. C. Properties (N.D. Cal. 1973), 353 F. Supp. 866), the court below apparently was unaware that it had the equitable power to condition its decree. Accordingly, we vacate the judgment and remand the case for consideration of the propriety of conditioning the grant of rescission on repayment of the Palmers. Upon remand the district court may decide to invite submission of additional affidavits or may hold an evidentiary hearing on this point. It may also require the defendants to submit a proposed plan for repayment that is consistent both with the defendants' desire to recover the amount of principal loaned to the Palmers and with the Palmers' current financial situation."

In the *Palmer* case one of the judges in concurring stated:

> "I concur with Judge Hufstedler but go farther. I believe that a court fashioning a decree in this type of case under the Truth In Lending Act must do equity and cannot ignore the plaintiffs' unpaid obligation for the principal sum of $9,300.00. Section 1635(b), Title 15, United States Code. If a rescission is demanded and effectuated without litigation, this Section requires the obligor to return the property or its reasonable value to the creditor. This, together with the Act's failure to void the principal obligation along with the security, is, for me, clear indication of Congressional intent that a complete windfall to the victim was not intended."

It has always been the position of the respondent, the lending institution, that the court had the right to condition the granting of rescission on obligors' own proposition, that is, that they tender and pay the original amount of the loan less all payments made to the time of the notice of rescission. Ordinarily, when there has been no offer to refund the

principal as here, the propriety of such a conditional decree of rescission depends upon the equities present in that particular case. Here, it appears, that all of the equities are with the respondent, the lender. There was never any attempt to sell the petitioners anything whatever. The petitioners, the obligors, were already indebted to the lending institution on the date of the loan complained of in the sum of $77,729.87, with a mortgage therefor on the very same land, and Goodwin and Nietert approached the bank for an additional sum of $30,000.00 with which to buy chickens. Thereupon at their request, the mortgage, note, and security agreements were rewritten to include the additional $30,000.00 for chickens which had already been procured for them by the Farmers Coop of Arkansas and Oklahoma. There was no question that this existing mortgage on the land was legal, no question of the balance due thereon and the entire transaction was a favor from the bank to the mortgagors in order that they may obtain the additional $30,000.00 to better use their land and equipment. According to all the evidence, there was no financing charge whatever except for interest. It is distinguished from many of the published cases under the Truth In Lending Act and Regulation Z in that there was no finders fee, no points, no insurance, credit life or otherwise, no abstracting costs, no attorneys fees — in fact, nothing whatever except the usual and ordinary interest rate with which the parties were entirely familiar, and same was a matter of common knowledge at the time they requested the mortgagee to rewrite the mortgage to include the additional $30,000.00, and it was fully shown by the disclosure statement, by the note itself, the mortgage and all other documents which evidenced the transaction. Even had there been finance charges which were not properly disclosed, under the hold-

ing in the *Palmer* case, *supra,* the court had the equitable power as well as the duty to condition the grant of rescission on payment of the principal. This was especially true under the circumstances here existing as the very notice of their election to rescind contained the unequivocal statement that it was their duty to repay the principal indebtedness less all payments previously paid and there was no request or suggestion that any security instrument be released or satisfied of record.

In the case of *LaGrone v. Johnson, et al* (April 21, 1976), 534 F.2d 1360, (Ninth Circuit), *LaGrone* owned a duplex in which she resided and which was subject to first and second deeds of trust. She procured a loan to prevent foreclosure on the second deed of trust from the Johnsons and executed security interest therein. After making a further and additional advancement of $5,000.00 to prevent foreclosure of the first deed of trust, and to preserve their security interest, and upon LaGrone again defaulting, the Johnsons eventually initiated foreclosure proceedings on their loan. A sale of her land was set but Mrs. LaGrone prevented the sale by filing an action for rescission, penalties, attorneys fees and other relief under the Truth In Lending Act in the United States District Court for the Northern District of California. The District Court held that Mrs. LaGrone was entitled to rescission with the judgment voiding the Johnsons' security interest in the duplex, finding that the Johnsons were entitled to recover $11,008.70 from Mrs. LaGrone but the District Court did not condition cancellation of the Johnsons' security interest on payment of the amount owed them by Mrs. LaGrone, and they were reduced to unsecured creditors. Among the issues presented to the Court of Appeals was whether the District Court should have conditioned rescission upon return by

Mrs. LaGrone of the monies advanced by the Johnsons. The court held that rescission should be conditioned on repayment in the following language:

> "We conclude, however, that the district court erred in not conditioning rescission on the tender of the net amounts advanced by the Johnsons. The discretion of the court to impose this condition is settled. Palmer v. Wilson, supra, 502 F.2d at 862; Ljepya v. M. L. S. C. Properties, Inc., supra, 511 F.2d at 944. We reject appellee's argument that this option is available only when both rescission and damages are at issue. The complaint in this case sought both remedies, but the civil penalty was barred by a one-year statute of limitations. Mrs. LaGrone should not be permitted to attain a preferred position with respect to rescission by waiting until the statute of limitations has run on the civil penalty. More important, it would be arbitrary to apply equitable principals to ameliorate unduly harsh penalties only if damages are sought. In this case the violations of the Act were not egregious and the equities heavily favor the creditors. Rescission therefor should have been conditioned on a tender by Mrs. LaGrone of the $11,008.70 advanced by the Johnsons."

Not only are all the equities with these respondents, the petitioners were the very first to recognize that they were obligated to return the original principal amount of the loan advanced after having received full credits for all payments made thereon, they were willing to pay interest at the rate reflected in the original note from May 3, 1976, until said principal amount had been paid. Upon their failure to secure funds to repay this money advanced, in desperation they seek to invoke the statutory scheme by

endeavoring to free their assets of the creditor's lien and leave it without any protection whatsoever. It was this action by the obligors which the trial court and Supreme court could not and would not condone.

Petitioners cite and rely upon the case of *Sosa v. Fite*, 498 F.2d 114 (August 1, 1974), (Fifth Circuit), in support of their present position that for the reason the respondents did not satisfy and release the mortgage of record within ten days from the date of the election to rescind, that they are entitled to retain the entire principal of the loan without any further obligation. A comparison of the facts and equalities in the *Sosa* case with the facts and equities in the case at bar is enlightening. In the *Sosa* case, a home improvements contractor of dubious repute entered into a contract with Mrs. Sosa to provide and install aluminum siding on her house. Included in the various documents, none of which Mrs. Sosa could grasp as she was unversed in the English language, was an instrument creating a deed of trust in favor of Tropical, a financial company which was a party to the action, to secure Sosa's payment of the total sales price. According to the opinion in that case, Sosa faithfully remitted monthly payments to Tropical over a considerable period of time, until her disenchantment with Fite's shoddy craftsmanship finally culminated in her refusal to make further payments. There was a foreclosure under the trust deed, the property was sold to a third party and it was at this point that Sosa invoked her right of rescission by an action in the United States District Court for the Southern District of Texas. Included in Sosa's notice of rescission was an express offer to return the aluminum siding and she did in fact make a tender. The following quotation is from the *Sosa* case:

"Our disposition of this case is not altered by the recent decision in Ljepya v. M. L. S. C. Properties, (N.D. Cal. 1973), 353 F. Supp. 866. In that case, the court permitted a borrower to rescind a tainted loan transaction violative of Truth-In-Lending on condition of repaying the principal, without interest, to the creditor within ten days of judgment. There is no indication in that case that the borrowers had ever attempted to return the proceeds of the loan, but instead the debtors were seeking simply to extricate themselves from the unwanted transaction. In that situation, it would have been consonant with the statute only for the debtors to remit to the creditor the loan proceeds in order to rescind the agreement, inasmuch as Section 1635(b) is clearly designed to restore the parties as much as possible to the status quo ante. But in the case sub judice, Sosa's express offer of restoration fell on deaf ears, thereby rendering applicable, upon the creditor's failure to comply with Section 1635(b), the plain directive of the statute: 'If the creditor does not take possession of the property within ten days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it.' "

The *Sosa* case fails to support the petitioners in any position or any argument but in fact the same in every particular supports the position of respondent.

In the case of *Powers v. Sims and Levin,* 542 F.2d 1216, (October 1, 1976), (Fourth Circuit), Powers desiring to effect improvements to their home at an estimated cost of $1,250.00, negotiated a loan from defendant for $5,000.00. The extra money was needed to repay a previous loan to another lender of $2,758.13, delinquent fire insurance

premiums, real estate taxes, and other debts or charges, a total to be disbursed in satisfaction of outstanding debts of $3,303.85. Powers elected to rescind for the reason that proper disclosure had not been made. Later Mr. Powers in an additional letter offered to return the property constituting the impovements but contended that they were not required to reimburse defendant for the amount it had spent to discharge the earlier indebtedness. The District Court as well as the Court of Appeals held that proper notice of right of rescission was not given. Under these facts the Appeals Court held that the debtors committed an anticipatory breach of contract and the creditor was no longer obligated to cancel its security interest. The following quotations are from the opinion of Chief Judge Haynsworth in that case:

"What the debtors accomplished was not a rescission under the statute. In the face of such an anticipatory breach, the creditor was entitled to retain both the payment and its security interest."

Surely under the facts in the case at bar the lender had the right to retain its security interest when the borrowers stated that they were obligated to pay the principal, no request was made for release and there was no controversy between the parties.

In *Powers v. Sims and Levin, supra,* the Court further held that that rescission is an equitable doctrine, and there is nothing in the statutory provision of the right of rescission or in the procedural steps outlined in Section 1635(b) which limit the power of a court of equity to circumscribe the right and to avoid the perpetration of stark inequity.

Surely the Congress in enacting the statute did not intend to require a lender to relinquish interest when it

knows that the lender does not intend and is not prepared to tender restitution. Also surely it did not intend that a lender release its security interest when the borrowers, through their counsel, were stating that they were obligated to repay the principal and if this was agreeable they would immediately make application for loan of funds to make such payment. They were not suggesting that there be a release until they obtained the funds and were in position to pay same.

Not only is the position of the respondent supported by all of the equities and the authorities, its position now is the same position which was adopted by the petitioners at the time of the decision to rescind and at the time of the notice of rescission. We have heretofore quoted from their letter giving notice of their election to rescind dated May 3, 1976, in which they stated that they were obligated to return the original principal amount of the loan advanced after having received full credit for all payments made thereon and we have also pointed out that they confirmed and clarified the letter of May 3, 1976, with an additional letter of May 13, 1976. These letters are shown fully in the Appendix of Petitioners' Brief in Support of their Petition for Writ of Certiorari.

In support of their present position that they are entitled to retain the entire proceeds of the loan and pay nothing whatever therefor, petitioners cite, in addition to the *Sosa* case, *supra,* the District Court cases of *Burley v. Bastrop Loan Company, Inc.,* 407 F. Supp. 773 (1976), and the case of *Gerasta v. Hibernia National Bank,* 411 F. Supp. 176 (1976). We see nothing about either of these district court cases which support the present position of the petitioners.

Petitioners' argument that the Supreme Court of Arkansas erred in failing to assess attorneys fees is likewise untenable. There is no question that the statute provides that in the case of any successful action to enforce compliance with the Truth-In-Lending Statute and Regulation Z, the costs of the action, together with a reasonable attorney's fee as determined by the court may be awarded. Petitioners would make it appear that there has been an action by them to enforce compliance with the requirements imposed under the Act and regulation. This is not true. No such suit was commenced and none was required as will appear from the letters from appellants counsel dated May 3rd and May 13, 1976, as heretofore referred to, in which there was no request or demand for action on the part of the lender except for forebearance while they made application for a loan for the necessary funds to repay the principal amount due; there was forebearance from the date of these letters until November 22, 1976, when this suit was commenced to foreclose the mortgage and security interest, and thereafter until September 28, 1977, when the cause was tried. Throughout all this time, the lender was ready, willing and able to completely release the mortgage and security instruments upon payment of the principal amount of the original loan less all payments made thereon as had been proposed by the obligors at the time of their election to rescind.

Not only has there been a failure to bring an action to compel compliance as contemplated by the statute and regulation, there was a complete failure to allege entitlement to or claim attorneys fees in any pleading filed in the cause until a counterclaim was filed on August 11, 1977, which was filed without permission of the court and out of

time approximately eleven months after the suit was originally filed. Although the original answer filed in behalf of petitioners, defendants, on February 9, 1977, was filed out of time so far as the record discloses, the respondent has heretofore admitted that there was an order of the court allowing an answer in behalf of defendants and which was granted by the court in response to their petition for authorization to file an answer, which appears in the transcript from the trial court. It appears that the order ganting this petition was inadvertently omitted from the transcript. There certainly was no authorization for pleadings filed by the defendants, petitioners, thereafter and no such authorization was sought.

Petitioners cite, quote verbatim and rely upon Title 15, U.S.C.A. Section 1640(a)(3) for their entitlement to a reasonable attorneys fee as determined by the court. Part of this same statute which they do not cite and quote is Title 15, U.S.C.A. Section 1640(3)(e) which is as follows:

> "Any action under this section may be brought in any United States District Court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."

No such action was brought within one year; no such action has been brought to this date. The most that can be said is that on August 11, 1977, in a counterclaim filed out of time the defendants, petitioners, prayed for the cost of this action together with a reasonable attorney's fee as determined by the court. At that time the action for any civil penalty, including attorney's fee, was barred by the section of the statute upon which petitioners now rely.

Respondent would readily concede that in an action

commenced in the proper court for the purpose of rescinding a transaction which was necessary to effect the rescission, begun within the time provided by the statute, there would be liability for a civil penalty, including reasonable attorney's fees to be determined by the court, and then only when the court found that the equities were in favor of the plaintiff prosecuting such an action.

In the case at bar there was never any reason for commencing an action to enforce rescission. There has always been the willingness upon the part of respondent to accept the principal indebtedness less all payments previously made, thereby forfeiting all the interest or financing charges, and the entire failure to complete the rescission has been petitioners' failure to obtain the funds to and pay the indebtedness as proposed in their letters of May 3rd and May 13, 1976.

In the *LaGrone v. Johnson* case, cited *supra*, the plaintiffs' counsel conceded that civil damages were barred by the one-year statute of limitations, 15 U.S.C.A. Section 1640(e), and the Court there held a civil penalty, including an attorney's fee, was barred by the one-year statute of limitations.

Petitioners, in support of their contention that the Arkansas courts should have allowed attorneys fee, cite and rely upon the same district court cases cited in support of their contention that they are entitled to a windfall of $107,729.87, the amount of the original note and mortgage signed by them, and they argue that these cases support them in both contentions. We see nothing about the District Court opinions in these cases which support respondents in either position taken by them.

CONCLUSION

The purpose of the Truth-In-Lending Act and Regulation Z thereunder was to assure that every customer who was in need of consumer credit was given meaningful information with respect to the cost of that credit, which, in most cases, must be expressed as an annual percentage rate computed on the unpaid balance of the amount financed.

In this case, as has been pointed out, the petitioners, Goodwin, were already indebted to respondent on the date of the loan in the sum of $77,729.87, and for which a mortgage then existed on the very same land, the Goodwins' home and farm. Goodwin and Nietert, approached the bank, respondent, for an additional sum of $30,000.00 with which to buy chickens, and the mortgage, note and security agreements were rewritten to include Mr. and Mrs. Nietert as joint obligors although they had no record title or ownership whatever, and to include the additional $30,000.00 for the chickens which had already been procured for them by the Farmers Coop of Arkansas and Oklahoma from Ken Ballew Hatcheries.

For some reason the officer of the bank who prepared the documents failed to furnish notice of the right of rescission to the two ladies involved or else failed to procure their written acknowledgment thereof. For this failure or omission and this alone, respondent has admitted and the court has found that the right of rescission exists. There is no material dispute as to the facts and the law is well established — the respondent has forfeited all financing charges to the date of the election to rescind, in this instance interest only, and it is the duty of obligors, petitioners, to refund the principal as they have heretofore recognized and admitted.

The judgment is in full compliance with the statute and regulation, especially considering the fact that the manner of effecting rescission was chosen by petitioners and agreed to by respondent, all the equities are with respondent, and there appears to be no special or important reason for the proposed review and the writ of certiorari should be denied.

Respectfully submitted,

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